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be created by implied grant,—the Civil Code in the section quoted says, “permanent.” Notwithstanding the statement of Mr. Justice Henshaw that the case is not unique, we believe that no similar case can be found in the books. The New Jersey case which he cites was one where, as Vice Chancellor Pitney (now Mr. Justice Pitney of the United States Supreme Court), points out in his opinion, the pump was situated on the dominant tenant’s land, so that there was no need of any entry every time it was used,—in other words, there was what the books call a continuous easement.⁶

However, in spite of the authorities, it may well be doubted whether the element of continuity in the sense in which the judges and text writers have interpreted it, is really important. The essential thing would seem to be that the means of enjoyment are apparent and not of so uncertain a character as to be incapable of definition. The element of continuity would seem to have been introduced by the courts to prevent the acquisition of rights of way, yet even with respect to them, the doctrine has been modified where permanent paved ways are involved.⁷ In the principal case, the plaintiff clearly had an easement to discharge water over the defendant’s land, and the mechanism by which he accomplished that result ought to be immaterial. The propriety of the result in the case under consideration can hardly be doubted.

O. K. M.

Estates in Land—Rule in Shelley’s Case.—“There is no knowledge, case or point, seem it never so little account, but will stand our student in stead at one time or another, and therefore in reading nothing to be pretermitted.”¹ So wrote Sir Edward Coke, and had he lived at a time when statutory changes from the common law were so prevalent as now, surely he would not have neglected to add, “or be it never so securely abolished by statute.” That a remainder to the heirs, in a deed or devise to the ancestor for life, is to be construed as a limitation on the ancestor’s estate, so that the heirs take by descent and not by purchase, is a simple rule, but the comment would seem to be not far wrong that it is “a rule which has done more to produce litigation than all the other arbitrary rules of law combined.”² The rule in Shelley’s Case³ was abolished in California in 1873,⁴ yet

⁶ *Larsen v. Peterson* (1895), 53 N. J. Eq. 80, 30 Atl. 1094, 1098; V. C. Pitney says: “I conclude that the word continuous in this connection means no more than this—that the structure which produces the change in the tenement shall be of a permanent character, and ready for use at the pleasure of the owner of the dominant tenement without making an entry on the servient tenement.”

⁷ *Brown v. Alabaster* (1887), L. R. 37 Ch. D. 490.

¹ Co. Litt. 9a.

² *Gross v. Sheeler* (1885), 7 Houst. (Del.) 280, 31 Atl. 812.

³ Cal. C. C., Sec. 779; *Barnett v. Barnett* (1894), 104 Cal. 298, 37 Pac. 1049. The code section in question applies to real property. Query, as to personal property is the rule abolished or not?

⁴ 1 Coke 93b.

in 1913 we find the Supreme Court of the State forced to determine whether or not the words of a deed call for the application of the rule.⁵

The deed in question was executed in 1872, prior to the abolition of the rule by statute. The words of importance in it were, "for and during his natural life, for the final use, benefit, and behoof of the children or other lawful heirs of his body, who may survive him." Singularly enough the son of the life tenant made the very opposite contention from that which in such case the heir usually makes, and claimed to have taken not by purchase but by descent from his father, while the defendant asserted that the plaintiff did take as a purchaser under the deed, in order to give validity to an execution sale and deed to defendant on judgment against the plaintiff, made during the lifetime of the father. The court decided in favor of the defendant, holding that under the wording of the deed, the rule in *Shelley's Case* did not apply.

Both the letter and the spirit of the decisions of the courts of most jurisdictions of this country seem to be in accord with such a result. Even in some of the States in which the rule is still in force, the courts admit that they always struggle against it and search the deed or will for some inconsistent provision which will exclude its application.⁶ It is clear that no expression of intention, however ironclad and definite, to limit the ancestor to a life estate or to have the heirs take as purchasers, will rescue the case from the rule;⁷ but any modifying words which show that the words "heirs" or "heirs of the body" were not used in their technical sense, will prevent its application.⁸ In the case at hand, the words "children or other lawful heirs of his body" might alone be construed still to mean "heirs of the body" in a technical sense.⁹ But the addition of the word "surviving"¹⁰ clearly shows that the phrase denotes particular persons answering the description at a particular time,—that not the whole line of inheritable succession was thereby designated, but merely certain particular persons to whom the estate should go upon the death of the

⁵ *Gordon v. Cadwalader* (Jan. 15, 1913), 45 Cal. Dec. 92.

⁶ *Reilly v. Bristow* (1907), 105 Md. 326, 66 Atl. 262.

⁷ *Reilly v. Bristow*, *supra*; *Roe v. Bedford* (1815), 4 Man. and Sel. 362; *Jesson v. Wright* (1820), 2 Bligh 1; *Norris v. Hensley* (1865), 27 Cal. 439; *Van Grutten v. Foxwell* (1897), 1897 App. Cases 656.

⁸ See Cases under 7; *Montgomery v. Sturdevant* (1871), 41 Cal. 290; *Findley v. Hill* (1902), 133 Ala. 229, 32 So. 497; *Ault v. Hillyard*, (1908), 138 Ia. 242, 115 N. W. 1030.

⁹ *Mason v. Ammon* (1887), 117 Pa. 127, 11 Atl. 449; *Sheeley v. Neidhammer* (1897), 182 Pa. 37, 37 Atl. 939; *Shapley v. Diehl* (1902), 203 Pa. 356, 53 Atl. 374.

¹⁰ *Gadsden v. Desportes* (1893), 39 S. C. 131, 17 S. E. 706; *Granger v. Granger* (1897), 147 Ind. 83, 46 N. E. 80; *Hill v. Giles* (1902), 201 Pa. 215, 50 Atl. 758; *contra*, *Hiester v. Yerger* (1895), 166 Pa. 445, 31 Atl. 122.

first taker and who would constitute a new stock with reference to whom the future succession should be regulated.¹¹

In abolishing the rule in *Shelley's Case*, California stands with the three-fourths of the States. Certainly one of the most plausible of the many suggested reasons for its existence,—the preservation of feudal perquisites attending the passing of estates by descent,¹² no longer exists. The justification that it facilitates alienation and prevents the indirect creation of an inalienable fee, is, of course, still a valid one.¹³ But it is probable that the view of the majority of both bench and bar is in accord with a North Carolina judge when he says,¹⁴ "the rule in *Shelley's Case*, the Don Quixote of the law, which, like the last knight errant of chivalry, has long survived every cause that gave it birth, and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous."

W. W. F. Jr.

Landlord and Tenant—Right of Sub-Lessee in Covenant for Renewal.

—If the defendant in *Standard Oil Co. v. Slye*¹ was really a sublessee, as he is designated by the court, the decision to the effect that he could insist on remaining in possession as against the purchaser of the land from the chief landlord because the latter has given a covenant of renewal to the original lessee would seem unsupported by principle or authority. That no privity of estate exists between the chief landlord and the sublessee is elementary. How a mere sublessee may take advantage of covenants in the lease in favor of the original lessee is not very clearly explained by the opinion of the court. And the authorities to the effect that he may not do so are numerous. It is very true, as the court says, that the covenant for renewal runs with the land, (or rather with the leasehold interest), but we believe that it has not hitherto been held that it or any other covenant runs in favor of sublessees or other occupants of the land who are not in privity with the original lessor.²

Perhaps it may be urged that this criticism is captious and merely verbal. It might be claimed that the defendant in the principal case was not truly a sublessee, as the court calls him, but, was, in fact, a partial assignee of the original leasehold interest. Indeed, this seems to have been the situation, for, with respect to the portion of the land which by various instruments came into the possession of Slye, there

¹¹ *Tallman v. Wood* (1841), 26 Wend. 9, 14 N. Y. C. L. R. 997; *Fulton v. Harman*, 44 Md. 264.

¹² *Hargrave's Law Tracts*, 551; *Van Grutter v. Foxwell*, *supra*; *Edmondson v. Dyson*, 2 Ga. 307.

¹³ *Blackstone in Perrin v. Blake*, *Hargrave's Law Tracts*, 500; *Evans v. Evans* (1892), 2 Ch. 173; *Hargrave's Law Tracts*, 551; *Doyle v. Andis* (1905), 127 Ia. 36, 102 N. W. 177.

¹⁴ *Douglas, J., in Stamper v. Stamper* (1897), 121 N. C. 251, 28 S. E. 20.

¹ (Jan. 4, 1913), 45 Cal. Dec. 30.

² 1 *Tiffany, Landlord and Tenant*, Sec. 164.